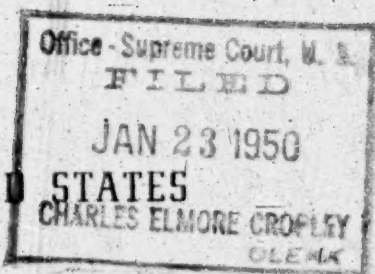


LIBRARY
SUPREME COURT, U. S.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~

1950

No. ~~554~~ 7

NATIONAL COUNCIL OF AMERICAN - SOVIET
FRIENDSHIP, INC., DENVER COUNCIL OF AMER-
ICAN-SOVIET FRIENDSHIP, WILLIAM HOWARD
MELISH, RICHARD MORFORD, HENRY PRATT
FAIRCHILD, JOHN A. KINGSBURY, M. WALTER
PESMAN, CORLISS LAMONT,

Petitioners,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE
UNITED STATES, SETH W. RICHARDSON, CHAIRMAN
OF THE LOYALTY REVIEW BOARD OF THE UNITED STATES
CIVIL SERVICE COMMISSION, GEORGE W. ALGER, JOHN
HARLAN AMEN, ET AL., ETC.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT.

ABRAHAM J. ISSERMAN,
DAVID REIN,
JOSEPH FORER,

Counsel for Petitioners.

INDEX

	Page
Opinions below	2
Summary statement of matter involved	2
Statement as to jurisdiction	6
Executive order involved	6
Questions presented	9
Reasons for granting the writ	10
1. The general nature of the issues presented	10
2. The "no justiciable controversy" holding	13
3. Violation of First Amendment rights	15
a. The First Amendment prohibits abridg- ment of expression and assembly by pub- lication of administrative findings	15
b. The abridgment of petitioners' rights under the First Amendment cannot be justified by any asserted relationship to the need for determining the loyalty of gov- ernment employees or applicants	19
4. Violation of Fifth Amendment rights	22
a. The Attorney-General's determination is "regulation" for due process purposes	22
b. The Attorney General's determination was made without due process of law	26
5. Violation of right against being defamed by ultra-vires action	28
a. Petitioners are entitled to relief if respond- ents' actions are in excess of constitutional or statutory authority	28
b. Respondents' actions are in excess of con- stitutional and statutory authority	33
Conclusion	35

CASES CITED

<i>American School of Magnetic Healing v. McAnnulty</i> , 187 U. S. 94	30
<i>American Sumatra Tobacco Corp. v. S. E. C.</i> , 93 F. (2d) 236	15
<i>Bank of America National Trust & Savings Assn. v.</i> <i>Douglas</i> , 105 F. (2d) 100	15

	Page
<i>Bridges v. Wixon</i> , 326 U. S. 135	19
<i>Buchanan v. Warley</i> , 245 U. S. 60	25
<i>Columbia Broadcasting System v. United States</i> , 316 U. S. 407	23
<i>Employers Group v. National War Labor Board</i> , 143 F. (2d) 145, cert. den., 323 U. S. 735	14
<i>Ex parte Endo</i> , 323 U. S. 283	15, 20
<i>Ex parte Richard Quirin</i> , 317 U. S. 1	33
<i>Glass v. Ickes</i> , 117 F. (2d) 273, cert. den., 311 U. S. 718	32
<i>Grant v. Readers' Digest Association</i> , 151 F. (2d) 733, cert. den., 326 U. S. 797	32
<i>Hannegan v. Esquire</i> , 327 U. S. 146	18, 34
<i>ICC v. Louisville & N. Ry. Co.</i> , 227 U. S. 88	28
<i>Illinois ex rel McCollum v. Bd. of Education</i> , 333 U. S. 203	17
<i>In re Oliver</i> , 333 U. S. 257	11, 28
<i>Joint Anti-Fascist Refugee Committee v. Clark</i> , 177 F. (2d) 79	2, 6
<i>Jones v. Opelika</i> , 316 U. S. 584	18
<i>Jones v. Opelika</i> , 319 U. S. 103	18
<i>Kirby v. United States</i> , 174 U. S. 47	28
<i>LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd.</i> , 336 U. S. 18	23
<i>Land v. Dollar</i> , 330 U. S. 731	30
<i>Lane v. Wilson</i> , 307 U. S. 273	19
<i>Larson v. Domestic & Foreign Commerce Corp.</i> , 337 U. S. 682	14
<i>Lloyd Sabaudo v. Elting</i> , 287 U. S. 329	27
<i>Marshall v. Gordon</i> , 243 U. S. 521	33
<i>Martin v. Struthers</i> , 319 U. S. 141	18
<i>McCulloch v. Maryland</i> , 4 Wheat 316	33
<i>Mencher v. Chesley</i> , 297 N. Y. 94, 75 N. E. (2d) 257	32
<i>Morgan v. United States</i> , 304 U. S. 1	27
<i>Motes v. United States</i> , 178 U. S. 458	27
<i>National War Labor Board v. U. S. Gypsum Co.</i> , 145 F. (2d) 97, cert. den., 324 U. S. 856	14
<i>N. Y. Society for Suppression of Vice v. MacFadden Publications</i> , 260 N. Y. 167, 183 N. E. 284	32
<i>Perkins v. Lukens Steel Co.</i> , 310 U. S. 113	29
<i>Philadelphia Co. v. Stimson</i> , 223 U. S. 605	30

INDEX

iii

Page

<i>Pierce v. Society of Sisters</i> , 268 U. S. 510	25
<i>Powell v. United States</i> , 300 U. S. 276	23
<i>Pullman Standard Car Mfg. Co. v. Union</i> , 152 F. (2d) 493	32
<i>Rochester Tel. Corp. v. United States</i> , 307 U. S. 125	23
<i>Schneider v. Irvington</i> , 308 U. S. 147	18
<i>Shields v. Utah Idaho Central R. R. Co.</i> , 305 U. S. 177	23, 27
<i>Spalding v. Vilas</i> , 161 U. S. 483	32
<i>Spanel v. Pegler</i> , 160 F. (2d) 619	31
<i>Standard Scale Co. v. Farrell</i> , 249 U. S. 571	14
<i>Tennessee Electric Power Co. v. TVA</i> , 306 U. S. 118	29
<i>Thomas v. Collins</i> , 323 U. S. 516	17, 34
<i>Thornhill v. Alabama</i> , 310 U. S. 88	21
<i>Truax v. Raich</i> , 239 U. S. 33	25
<i>United Public Workers v. Mitchell</i> , 330 U. S. 75	22
<i>U. S. v. Abilene</i> , 265 U. S. 274	28
<i>U. S. v. Ballard</i> , 322 U. S. 78	15
<i>U. S. v. Butler</i> , 297 U. S. 1	33
<i>United States v. Cohen Grocery Company</i> , 255 U. S. 8	27
<i>United States v. Cruikshank</i> , 92 U. S. 542	27
<i>United States v. Los Angeles & S. L. R. Co.</i> , 273 U. S. 299	14
<i>United States v. Lovett</i> , 328 U. S. 303	28, 32
<i>United States ex rel. Knauff v. Shaughnessy</i> , No. 54, October Term, 1949	10
<i>U. S. v. United Mine Workers of America</i> , 330 U. S. 258	28
<i>Utah Fuel Co. v. National Bituminous Coal Commission</i> , 306 U. S. 56	14
<i>Waite v. Macy</i> , 246 U. S. 606	23
<i>West Virginia Bd. of Education v. Barnette</i> , 319 U. S. 624	34
<i>Winters v. New York</i> , 333 U. S. 507	21
<i>Wright v. Farm Journal, Inc.</i> , 158 F. (2d) 197	31

CONSTITUTION, STATUTES, AND EXECUTIVE ORDER CITED

	Page
5 U. S. C. § 118i	22
5 U. S. C. § 118j	33
28 U. S. C. § 1254	6
Executive Order 9835	6
Constitution, First Amendment	9, 13, 15, 29, 30
Constitution, Fifth Amendment	13, 29, 30
Constitution, Ninth Amendment	9, 13
Constitution, Tenth Amendment	9, 15, 29, 30
Constitution, Fourteenth Amendment	13
Constitution, Fifteenth Amendment	18
Constitution, Article II, sec. 3	33

ARTICLES AND TREATISES

Commager, Who Is Loyal to America, Harper's Magazine, Sept., 1947	34
DeTocqueville, Democracy in America (Bradley ed. 1945)	34
Ernerson and Helfeld, Loyalty Among Government Employees, 58 Yale L. J. 1	34
O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592	34
Restatement, Torts	32

MISCELLANEOUS

The Washington Post, July 1, 1948	11
Listing by Attorney General, 13 F. R. 9366	21
Ruling by Comptroller General, 17 U. S. Law Week 2327, Jan. 25, 1949	33

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 554

**NATIONAL COUNCIL OF AMERICAN - SOVIET
FRIENDSHIP, INC., DENVER COUNCIL OF AMER-
ICAN-SOVIET FRIENDSHIP, WILLIAM HOWARD
MELISH, RICHARD MORFORD, HENRY PRATT
FAIRCHILD, JOHN A. KINGSBURY, M. WALTER
PESMAN, CORLISS LAMONT,**

Petitioners,

vs.

**J. HOWARD McGRATH, ATTORNEY GENERAL OF THE
UNITED STATES, SETH W. RICHARDSON, CHAIRMAN
OF THE LOYALTY REVIEW BOARD OF THE UNITED STATES
CIVIL SERVICE COMMISSION, GEORGE W. ALGER, JOHN
HARLAN AMEN, ET AL., ETC.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT.**

The petitioners above-named pray that a writ of cer-
tiorari issue to review a decision of the United States Court
of Appeals for the District of Columbia, rendered October

25, 1949, affirming a judgment of the United States District Court for the District of Columbia dismissing the complaint of petitioners against the above-named respondents.¹

Opinions Below

The Court of Appeals did not file an opinion, but its order of affirmance rested on the Court's previous opinion in *Joint Anti-Fascist Refugee Committee, v. Clark*, 177 F. (2d) 79. The opinion of the District Court has not been reported. It appears at R. 17-19.

Summary Statement of Matter Involved

On June 29, 1948, the petitioners filed a complaint in the District Court for the District of Columbia seeking an injunction and declaratory judgment against the Attorney General and the chairman and members of the Loyalty Review Board of the United States Civil Service Commission (hereinafter called the Board) (R. 2, 6).

No answer to the complaint was filed. Respondents filed a motion to dismiss the complaint (R. 17), which was granted (R. 19). Accordingly, the allegations of the complaint must be taken as true for present purposes.

The allegations of the complaint (R. 2-16) are summarized as follows.

Executive Order 9835 establishes an employees loyalty program in the executive branch of the federal government. Section III(3) of the Order requires the Attorney General to supply to the Board the names of organizations designated by him, after appropriate investigation and determination, as "totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny

¹ The complaint originally named Tom C. Clark, Attorney General, as a defendant. Respondent McGrath was substituted by order of the Court of Appeals (R. 21).

others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

The Board is required to disseminate this information to the various federal departments and agencies for use in proceedings to determine whether applicants for federal employment shall be denied employment and whether federal employees shall be dismissed on the basis that "reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Ex. Order, III (3) (a), V (1)). Thus in determining this issue, the adjudicating bodies consider the employee's or applicant's "membership in, affiliation with or sympathetic association with" any organization on the Attorney General's "subversive list" (id., V(2) (f)).

In November 1947 and May 1948, the Attorney General furnished the Board a list of organizations so designated by him, and included therein the name of petitioner National Council of American-Soviet Friendship, Inc. (hereinafter called the National Council) (R. 11). The National Council had never received any advance notice that it would be so listed, and the Attorney General had not made an "appropriate investigation and determination," as required by the Executive Order, prior to listing the National Council (R. 11, 12). The National Council requested the Attorney General for the particulars on which he had based his conclusion and for a hearing at which it could refute his charges. The Attorney General refused on the grounds that such procedures were not authorized by the Executive Order (R. 12).

In December 1947 and May 1948, the Board released for publication the listing of the Attorney General, which included the name of the National Council. This listing received wide and repeated publicity throughout the country (R. 12).

The National Council is a non-profit membership corporation, whose purpose is "to strengthen friendly relations between the United States and the Union of Soviet Socialist Republics by disseminating to the American people educational material regarding the Soviet Union, by developing cultural relations between the peoples of the two nations, and by combating anti-Soviet propaganda designed to disrupt friendly relations between the peoples of these nations and to divide the United Nations" (R. 4). It engages in numerous activities to further these purposes, including exhibition, circulation and publication of materials and literature dealing with life in the Soviet Union, maintaining a speakers' bureau, holding of public meetings, etc., many of which involve cooperation with museums, libraries, schools and other organizations (R. 6-9). It has expended large sums up to approximately \$100,000 per annum, to finance its activities, including the maintenance of a staff and office, preparation of literature and other materials, etc. (R. 9). Its revenues have been generally derived by contributions from organizations and individuals in sympathy with its objectives and largely through collections at meetings (*ibid*).

The National Council has never engaged in any conduct or activity which provides any basis for it to be designated as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts by force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means" (R. 10).

The Denver Council of American-Soviet Friendship, also a petitioner, is one of the affiliates of the National Council (R. 4). The individual petitioners are officers or directors of the National Council or the Denver Council (R. 4, 5).

As a result of the actions of respondents in listing and

publicizing the National Council as a "subversive" organization² and in using the listing in the loyalty program, the National Council's activities have been seriously hampered and it has suffered great pecuniary loss. Thus the National Council and its affiliates, including the Denver Council, have lost numerous members and officers, lost public support and contributions, lost attendance at meetings, lost circulation of their publications, lost acceptance by schools and organizations of their material, have been denied meeting places and radio time, and are unable to get members and support from federal employees. In addition, the listing caused the Treasury to rule publicly that contributions to the National Council and its affiliates will no longer be recognized as tax-exempt contributions to educational institutions, with the result that the National Council and its affiliates have lost large sums of money which they would otherwise have received as contributions (R. 13, 14).

Serious damage has also been caused to the individual petitioners by respondents' actions. Rev. Melish's position as Assistant Rector of the Church of the Holy Trinity has been jeopardized. Morford has been hampered in the right to perform his duties and employment (from which he receives his livelihood) as chief executive of the National Council. Fairchild, Kingsbury and Lamont are lecturers, and have lost bookings and had their professional standing impaired. Pesman has lost commissions, as an architect for public bodies has had contracts cancelled, and has lost his teaching position at a university (R. 15). In addition, the individual petitioners and all members and supporters of the National Council have been hampered in their right to associate in the activities of the Council and have had their opportunities for public and private employment impaired

² We use the word "subversive" henceforth as including any or all of the categories referred to in section III(3) of Executive Order 9835--i.e., "totalitarian, fascist, communist, subversive," etc.

(R. 15, 16). The reputations of petitioners have been damaged and they have been subjected to vilification and harassment (R. 12, 13).

The complaint alleged that the actions of the respondents were unconstitutional and in excess of any statutory authority (R. 13), and that Part III, section 3 and Part V, section 2 of Executive Order 9835 are unconstitutional as construed and applied by the Attorney General (*ibid.*). The relief sought included a declaratory judgment to this effect and an injunction restraining the respondents from keeping in effect the listing of the National Council or taking any action on the basis thereof (R. 16).

The judgment of the District Court dismissing the complaint was affirmed by the Court of Appeals for the District of Columbia on October 25, 1949. It rendered no opinion in the case, but its order (R. 20) relied on its opinion in *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F(2d) 79. That opinion, however, was not addressed to the arguments, which are relied upon herein and which were contained in petitioners' brief filed in the Court of Appeals urging reversal of the decision of the District Court.

Statement as to Jurisdiction

The judgment of the Court of Appeals was entered on October 25, 1949 (R. 20). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254.

Executive Order Involved

Executive Order 9835, 12 F. R. 1935, issued March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government" provides in part as follows:

Part III, Sec. 1

There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three im-

partial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

Part III, Sec. 3

The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the

commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

Part V

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Questions Presented

(1) Whether the petitioners or any of them may challenge the constitutionality of the actions of the respondents in listing the National Council as a subversive organization, contrary to fact and without appropriate investigation and without ordinary due process procedures, in publicizing that listing, and in applying the listing in passing on the eligibility of persons having or seeking government employment, when such actions have seriously impaired the rights of petitioners to speak and assemble, have defamed their reputation, and have caused them serious financial loss, as described in the complaint.

(2) Whether the action of the Attorney General in designating the National Council, contrary to fact, as a "subversive" organization for the purposes of Executive Order 9835 is in excess of the executive power conferred by the Constitution, and in violation of the Ninth and Tenth Amendments.

(3) Whether such action of the Attorney General violates the Fifth Amendment as having been taken without procedural due process of law.

(4) Whether the described actions of respondents abridge petitioners' freedoms of speech and assembly in violation of the First Amendment.

(5) Whether petitioners' complaint stated a claim upon which relief can be granted.

Reasons for Granting the Writ

The writ should be granted because (1) the issues involved have not heretofore been determined by this Court; (2) they are of great public importance; (3) they are of great constitutional significance; (4) the decision below contravenes principles established by decisions of this Court. In what follows, we develop these reasons further.

1. THE GENERAL NATURE OF THE ISSUES PRESENTED

This case presents another application of the growing tendency of the making of administrative decisions which seriously impair individual liberties, and which are made without procedural safeguards and on the basis of secret evidence locked in the bosom of the administrator and never susceptible of rebuttal by those affected. Such administrative decisions, the omission of procedural standards, and the reliance on undisclosed evidence, are all invariably justified by a claim of the needs of "internal security." With reference to this claim Justice Jackson spoke as follows: (dissenting in *United States ex rel. Knaufl v. Shaughnessy*, No. 54 of this Term)

Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddling, and the corrupt to play the role of informer

undetected and uncorrected. Cf. *In re Oliver*, 330 U. S. 257, 268.

This case goes even further than *Knauff's* case. Here is involved not the enjoyment of a privilege conferrable by the sovereign at will, but the exercise of constitutional rights of free speech and assembly which are the core of our democratic system. Here the action rests on no statute. Indeed, the Attorney General's designation is, under the complaint, in violation of an Executive Order and of a statute.

Here the court below refused even to concede those aggrieved any standing to challenge action alleged as being unconstitutional and beyond and in violation of statutory authority. It has thus created a doctrine that constitutional rights may be freely infringed provided the infringement is accomplished by sophisticated procedures.

Here the respondents urged below, and the court sustained the contention, that actions of the federal executive are not subject to judicial review so long as they claim "security" considerations (see *Joint Anti-Fascist Refugee Committee v. Clark*, *supra*, at 82). It has thus created a doctrine at variance with the historic theories that our Constitution confers only limited powers and that a system of checks and balances is available to curtail abuse of power and ultra-vires action.

It does not take a lawyer to understand the significance of what is involved here. In an editorial of the Washington Post for July 1, 1948, the following comment appeared with respect to the respondents' actions against the petitioners:

From the moment that the loyalty review program was first promulgated by executive order this newspaper has condemned the absolute power conferred by it upon the Attorney General to single out voluntary associations of American citizens and stigmatize them

as disloyal. The power amounts in effect to a power to proscribe and destroy. . . .

If men may not join hands to espouse ideas which are unpopular then the constitutional guarantee of free speech and free association are mere myths. It is wholly on account of the currently unfashionable opinions which it advocates and not on account of any illegal or even improper acts that the Council of American-Soviet Friendship has been branded subversive by the Attorney General. To permit the Attorney General to place such a brand upon any group for the mere advocacy of ideas is to permit him to silence all dissent.

If the Attorney General can put the Council of American-Soviet Friendship outside the pale of decency by an arbitrary designation of it as disloyal, he can do the same in respect of any religious, political or social organization advocating unorthodox or unconventional beliefs. This is a power incompatible with a government of laws. It is a power irreconcilable with freedom.

The court below has held that the respondents may outlaw organizations and their members because they exercise their rights to speak and assemble. It has held that this outlawry may be accomplished without a hearing on the basis of false evidence clandestinely assembled and never exposed. It has held that the petitioners cannot be injured by being so outlawed, although the complaint, which must be taken as true, alleges extensive and irremediable harm. It has held that associations and individuals have no recourse against defamation by government officials acting outside the law and serving no governmental purpose. These holdings do not rest on an overwhelming compulsion of legal principles as amply appears from the dissent of

Judge Edgerton in the *Joint Anti-Fascist* case, *supra*, 177 F. (2d) at 84-91. These holdings cry for review by this Court.

2. THE "NO JUSTICIABLE CONTROVERSY" HOLDING

The primary ground of decision below, as shown by the opinion of the District Court and that of the Court of Appeals in the *Joint Anti-Fascist* case, *supra*, was that petitioners could not maintain the action because there was no "justiciable controversy." The theory of this holding was that the Attorney General's designation "imposes no obligation or restraint," "commands nothing" of the National Council, denies it "no authority, privilege, immunity or license," and subjects it to "no liability." *Joint Anti-Fascist* case, *supra*, 177 F. (2d) at 82.

Petitioners' theory is that respondents' actions and the relevant sections of Executive Order 9835 as construed by the Attorney General are invalid as being in excess of the power of the Executive and as violating the First, Fifth, Ninth and Tenth Amendments. Petitioners urge that these invalid actions have damaged interests of petitioners which are protected by the First and Fifth Amendments, as well as interests which are judicially protected against ultra vires actions of government officials.

It seems plain that the extent of protection afforded to various interests by different constitutional provisions and rules of law will differ with the several provisions and rules involved. The courts below, however, adopted a broadside rule to the effect that no interest is legally protected against harm caused by publication of administrative findings.

But this is an absurd generalization. The cases relied on by the courts below ruled that the due process clauses of the Fifth and Fourteenth Amendments protect only against governmental action which is at least "regulation," that mere publication of administrative findings is not "regu-

lation.”³ All these cases did was to construe the words “shall be deprived” in the due process clauses as extending only to action which is at least “regulation” (i.e., which commands or restrains action or creates liability) and not merely publication of findings. They did not and could not decide that constitutional provisions other than the due process clause do not protect certain interests against harm from action which is less than “regulation.” In all common sense, it is necessary to explore each case with respect to the particular interest involved and the source of protection claimed.

It is perfectly apparent that most actions maintained against the federal government or its agents are to vindicate common-law rights, as those against breaches of contract or torts, and not for damage caused by “regulation.” If the sovereign’s immunity has been waived or otherwise eliminated, these actions are not dismissed as presenting “no justiciable controversy” merely because they do not involve regulation or direction of the plaintiff.

In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 704, this Court stated: “Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of the officers of the Government, . . . courts have the power to grant relief against these actions.” In *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56, this Court held that equity relief was available if an administrative agency threatened to commit harm (to com-

³ Both *Standard Scale Co. v. Farrell*, 249 U. S. 571 and *United States v. Los Angeles & S.L.R. Co.*, 273 U. S. 299 involved claims of deprivation of property without due process of law. *Employers Group v. National War Labor Board*, 143 F. (2d) 145, Cert. den. 323 U. S. 735 and *National War Labor Board v. U. S. Gypsum Co.*, 145 F. (2d) 97, Cert. den. 324 U. S. 856, held that an unenforceable “directive” which creates no legal liabilities is not “deprivation” of property for due process purposes, merely because it might subsequently induce the President to seize property (an action which would be such “deprivation”).

mon-law interests) merely by publishing, in excess of statutory authority, confidential business information. The Court of Appeals of the District of Columbia has itself held to like effect in a case in which the distraction of spurious pleas of "security" was absent. *Bank of America National Trust & Savings Ass'n v. Douglas*, 105 F. (2d) 100; cf. *American Sumatra Tobacco Corp. v. SEC*, 93 F. (2d) 236. In these cases "regulation" was not necessary because the rights enforced were not derived from the due process clause.

In what follows we shall see that petitioners' complaint alleges harm to interests which are legally protected against damage by publication of administrative findings. We shall also see that for due process purposes the actions of respondents were in fact "regulation" within principles established by this Court.

3. VIOLATION OF FIRST AMENDMENT RIGHTS⁴

a. *The First Amendment prohibits abridgment of expression and assembly by publication of administrative findings.*

The First Amendment creates rights against any harm by governmental action to the freedoms described in the Amendment. Accordingly, the freedoms of speech, press and assembly are protected against any governmental action which in fact restrains or interferes with ("abridges") them, including interference accomplished by the mere publication of administrative findings.

Whether or not the respondents' actions have abridged the freedoms of petitioners protected by the First Amend-

⁴ It is unnecessary to argue that the First Amendment restricts actions of the federal executive. *Ex parte Endo*, 323 U. S. 283. It is also, of course, applicable to the judicial branch. *U. S. v. Ballard*, 322 U. S. 78. Obviously the executive, who is clearly bound by the First Amendment when carrying out a legislative mandate, cannot free himself from its restrictions merely by acting without or in defiance of legislative authorization.

ment is thus essentially a factual issue. The complaint, whose allegations must be taken as true, alleges that the respondents' actions did and does abridge these freedoms of the petitioners and sets out in some detail the factual nature and extent of the abridgement. Even aside from the allegations of the complaint it is perfectly evident that the respondents' actions must necessarily have the effect of abridging petitioners' rights under the First Amendment.

Since the complaint clearly and factually alleges that the respondents abridged (i. e., interfered with) the rights of the petitioners guaranteed by the First Amendment, that should put an end to the question as to whether the complaint states a cause of action. If the government takes issue with the facts alleged, and maintains that the respondents did not interfere with the petitioners' rights under the First Amendment, that is an issue to be raised by answer and resolved by a trial. It cannot be raised by a motion to dismiss.

But despite the clear allegations of the complaint, the opinion of the District Court indicated that the abridgement of petitioners' rights under the First Amendment was "indirect," "and any indirect effect it might have upon the plaintiffs does not constitute legal damage" (R. 18).⁵ But there is no warrant, in the light of the allegations of the complaint, for any assertion that the abridgement of petitioners' rights was "indirect." Neither does the First Amendment recognize a distinction between "indirect" and "direct" abridgement of the rights therein guaranteed.

It is true that in the present case the petitioners' rights were not abridged by any order addressed to them and requiring them to do or refrain from doing something.

⁵ Similarly the opinion in the *Joint Anti-Fascist* case referred to the injury in that case as being "indirect". 177 F. (2d) at 83.

Rather, the harm was caused by the respondents stimulating others to take action against the petitioners; i. e., by inducing government employees to leave the organization and to refuse to attend meetings or to contribute support, by inducing members of the public to take similar action, by inducing owners of meeting places and radio stations to deny their facilities, by inducing colleges, schools and other organizations to refuse to accept the Council's publications, etc. But these interferences were the direct, and indeed the inevitable, result of respondents' actions, and so the complaint alleges.

In any event, speculation on "direct" or "indirect" consequence is immaterial. Since the First Amendment protects the rights of free speech and assembly against any governmental harm, it protects against harm caused by the government's stimulating others to harmful conduct. Thus in *Illinois ex rel. McCollum v. Bd. of Education*, 333 U. S. 203, an interest included within the First Amendment was protected against invasion by governmental disclosure of religious non-conformity resulting in embarrassment and humiliation. Similarly, protection against invasion of First Amendment liberties by a mere requirement of disclosure of identity as a labor organizer was afforded in *Thomas v. Collins*, 323 U. S. 516. In both these cases, the governmental action merely exposed persons to conduct or attitudes of other persons which had a restraining effect on the complaining parties. Yet the First Amendment was held violated.⁶ So here the petitioners have, by governmental action, been exposed to similar restraining conduct and attitudes on the part of the public. It is enough, in other words, to run afoul of the First Amendment if the government invites the commission of aggressions against

⁶ The *McCollum* case also supports our thesis that the First Amendment protects against damaging actions by government even though they do not order someone to do or refrain from doing something.

those exercising rights of speech and assembly. In the present case the invitation is coupled with governmental sanctions against support of the National Council by, at least, present and prospective government employees.

Even the Fifth Amendment, as we shall see, protects against harm caused to one person by governmental action directed against another. The First Amendment, with its preferred position (*Thomas v. Collins*, *supra* at 529, 530), can do no less.

If we must think in the terms "direct" and "indirect," employed by the courts below, it can be added that the First Amendment protects the freedoms of speech, press and assembly against such other "indirect" forms of action as denial of second-class mailing privileges (cf. *Hannegan v. Esquire*, 327 U. S. 146), the imposition of a tax (*Jones v. Opelika*, 319 U. S. 103, adopting dissents in 316 U. S. 584, 601, 610, 622), a prohibition against littering the streets (*Schneider v. Irvington*, 308 U. S. 147), and a regulation prohibiting annoyance to individuals in their houses (*Martin v. Struthers*, 319 U. S. 141).

This rule, that the First Amendment prohibits *all* abridgements of speech or press, "direct" or "indirect," is essential to the functioning of that Amendment. "It is not often in this country that we now meet with direct and candid efforts to stop speaking and publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control." Jackson, J., concurring in *Thomas v. Collins*, *supra*, at 547.⁷ Just as the Fifteenth Amendment "nullifies

⁷ Cf. the editorial in the *Washington Post*, cited *supra*: "When the Attorney General calls this group (the National Council) subversive he tells the American people, in effect, that it is anti-American and serving the interest of a foreign power. If it is actually the agent of a foreign government, then it is obliged under the terms of the Voorhis Act to register as

sophisticated as well as simple-minded modes of discrimination" (*Lane v. Wilson*, 307 U. S. 273, 275), so the First Amendment nullifies sophisticated as well as simple-minded encroachments on the freedoms of speech and assembly. Accordingly, "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." *Stone, J.*, in *Jones v. Opelika*, *supra*, 316 U. S. at 609.

The only limitation upon the protections of the First Amendment which has been recognized by the courts is that of the "clear and present danger" doctrine. *Bridges v. Wixon*, 326 U. S. 135. It is unnecessary to discuss the application of that doctrine here, since no contention is raised by the government that the actions of petitioners constituted a clear and present danger, and it is clear from the allegations in the complaint setting forth the activities of petitioners that no such contention can validly be made. Accordingly, the complaint alleges that respondents are abridging interests of petitioners protected by the First Amendment, and petitioners have standing to restrain further abridgement.

b. *The abridgement of petitioners' rights under the First Amendment cannot be justified by any asserted relationship to the need for determining the loyalty of government employees or applicants.*

The opinion of the Court of Appeals in the *Joint Anti-Fascist* case, *supra*, indicated that the action in that case was justified because of some asserted relationship to a program of the Executive to insure that government employees be loyal to the government of the United States.

such with the Department of Justice and is subject to prosecution for having failed to do so. No attempt to prosecute it has been made, however. One can only conclude, therefore, that the department is attempting to accomplish by harassment and vilification what it is unable to accomplish within the law."

We do not here dispute the right of the government to discharge disloyal employees, including, for example, those who commit sabotage, espionage, treason or sedition, or who advocate the violent overthrow of government, or who are agents for foreign governments.

But the right to exclude disloyal employees has no bearing on this case. We need not consider whether petitioners' First Amendment rights can be curtailed in the interests of insuring that federal employees are loyal. However that may be, certainly their rights cannot be curtailed by actions which have no substantial relevance to such an objective. In view of the complaint's allegations as to the nature and activities of the National Council, the loyalty of federal employees is in no wise served by inhibiting them from belonging to or "sympathetically associating with" the National Council and by libelling the National Council and its members.⁸

If, arguendo, the Attorney General may designate subversive organizations for the purpose of determining eligibility for government service, certainly he has no power to designate as disloyal organizations which, like the National Council, are loyal.⁹ *Cf. Ex parte Endo*, 323 U. S. 283. It is incumbent upon the government in administering any program relating to the ferreting out and discharge of disloyal employees to develop a procedure which will accomplish this end without denying to others rights guaranteed

⁸ *Cf.* Judge Edgerton, dissenting, in the *Joint Anti-Fascist* case, *supra*, 177 F. (2d) at 86: "On the present record, appellee's ruling against appellant has no more tendency to promote the efficiency of the civil service than a similar ruling against the Republican Party or the Methodist Church would have."

⁹ In the *Joint Anti-Fascist* case, *supra*, the majority apparently considered it to be of some significance that the complaint there involved did not expressly deny that the organization fell within the subversive categories of the Executive Order. 177 F. (2d) at 81. The complaint in this case does contain such an express denial. (R. 10).

by the First Amendment.¹⁰ *Thornhill v. Alabama*, 310 U. S. 88; *Winters v. New York*, 333 U. S. 507.

The procedure employed leaves to the unfettered discretion of the Attorney General what organizations should be listed and thus stigmatized. The Attorney General's action was taken without notice or hearing, without particulars, without supporting evidence, and without the opportunity to the National Council to know the evidence against it, to cross-examine witnesses, or to present evidence on its own behalf. Further, the standards in the Executive Order, "totalitarian, fascist, communist, or subversive," are without reasonably precise meaning or content. They are not defined by the Executive Order, nor have they been defined by the Attorney General. The end result of such a procedure is that the Attorney General may list any organization which incurs his displeasure, without regard to the aims and activities of that organization, and whether the organization be loyal or disloyal. And that is exactly what he has done. The government offers no justification for such procedure, and none can be offered. Whatever may be the need to ferret out and discharge disloyal employees, the use of such arbitrary procedures and vague standards to the damage of lawful, loyal organizations and persons in the exercise of their constitutional rights of speech, press and assembly, clearly contributes nothing toward satisfying that need.

The establishment of conditions for government employment which restricts the rights of government employees

¹⁰ And all the more so if the damage caused is wholly disproportionate to the benefits sought. Contrast the harm to petitioners with the circumstance that an employee's affiliation with a branded organization "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case" (emphasis supplied). Directive from the Attorney General to the Loyalty Review Board, transmitting list of organizations designated as subversive. 13 F. R. 9366.

to hold and express lawful beliefs and opinions on political subjects, such as those advocated by the National Council, is a violation both of the Constitution (*United Public Workers v. Mitchell*, 330 U. S. 75, 100) and of the Hatch Act, pursuant to which the Attorney General purportedly acted. That Act provides that federal employees "shall retain the right to express their opinions on all political subjects and candidates" (5 U. S. C., sec. 118i).

The decision below enables the executive to impose unconstitutional and illegal conditions for government employment and then to resist any inquiry into his illegal actions simply by making the bare, unsubstantiated assertion that he acted pursuant to the President's "right and . . . duty to protect and defend the government against subversive forces which may seek to change or destroy it by unconstitutional means" and to "protect the civil service from disloyal and subversive elements." See *Joint Anti-Fascist* case, *supra*, at 84.

4. VIOLATION OF FIFTH AMENDMENT RIGHTS

a. *The Attorney-General's determination is "regulation" for due process purposes.*

The Fifth Amendment creates a right to have certain minimum procedural standards observed when government action "deprives" a person of life, liberty or property. It is, of course, clear that "deprivation" includes "regulation" affecting (as it always does) life, liberty or property. It does not include administrative findings which are not "regulation."

Under the authorities, however, the Attorney General's determination that the National Council is "subversive" is more than a mere finding and is "regulation;" it is, therefore, subject to the requirements of due process.

The cases hold that if an administrative finding or rul-

ing fixes a status or establishes legal relationships so as to lay a foundation for future regulation, then the finding or ruling is itself a "regulation" even though it does not itself command or restrain action. *LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U. S. 18; *Columbia Broadcasting System v. United States*, 316 U. S. 407; *Waite v. Macy*, 246 U. S. 606; *Rochester Tel. Corp. v. United States*, 307 U. S. 125; *Powell v. United States*, 300 U. S. 276. Thus in the *LaCrosse Telephone* case, a state labor board's certification of an employee bargaining representative was held reviewable for validity even though the certification itself commanded no action; however, the employer's refusal to bargain with the certified representative could have subjected him to an administrative order for the unfair labor practice of refusing to bargain with a certified representative.

Where the administrative finding has such a status-determining effect, an administrative hearing is required by due process. *Shields v. Utah Idaho Central R. R. Co.*, 305 U. S. 177.

The determination here made by the Attorney General falls squarely within the status-determining principle, since it fixes the status of the National Council as a "subversive" organization for the purpose of supplying a foundation for action by agency loyalty boards, agency heads, and the Loyalty Review Board in discharging employees or refusing to employ applicants. This is, indeed, a conclusive fixing of status, since the loyalty boards and agency heads cannot, under the terms of the Executive Order, reject the Attorney General's determination as erroneous.

The situation presented is, like that in the *Columbia Broadcasting* and *Waite* cases, *supra*. In the *Columbia Broadcasting* case, the FCC adopted a rule for its own future guidance in granting or denying radio station licenses. The Court held that this rule was itself a review-

able order even prior to any licensing action based thereon, since it fixed the status of future license applicants. So here the Attorney General's determination fixes a rule for the guidance of agencies and boards in granting or denying a license for federal employment. This case is, indeed, stronger, for in *Columbia Broadcasting* the ruling could have been changed in the licensing proceeding by the agency passing on license eligibility, whereas here the Attorney General's ruling cannot be changed by those passing on employment eligibility. Furthermore, the FCC ruling was, unlike the Attorney General's ruling, in general terms and did not pass on any particular radio station by name.

In *Waite v. Macy, supra*, the Secretary of the Treasury adopted a rule laying down tests as to what constituted impure tea. A Tea Board regularly applied this rule in determining which tea was importable and which should be excluded. The Secretary's rule was held to be an order reviewable on complaint by a tea importer even without action by the Tea Board excluding his tea. So here the Attorney General's ruling that the National Council is "impure" for purposes of proceedings relating to exclusion of persons from federal employment is a reviewable order.

Accordingly, the Attorney General's determination is a regulation and a reviewable order which must conform to due process requirements, since it establishes standards, (defines status) for proceedings determining eligibility for federal employment.

The fact that this status is determined for proceedings determining eligibility of members or supporters of or contributors to the National Council rather than eligibility of the National Council itself does not affect the standing of the National Council to test the determination. This is

because the determination and the action pursuant thereto have an impact on (i. e., regulate) the relationship of employees or prospective employees with the National Council and thereby regulate the Council itself. Thus, as the complaint alleges, the finding has induced government employees to abandon or desist from membership in the Council and from giving it financial support. So in *Pierce v. Society of Sisters*, 268 U. S. 510, a school was held able to test the validity of a law which directly regulated only pupils, but which had the effect of inducing pupils not to attend the complaining school. In *Truax v. Raich*, 239 U. S. 33, an employee was able to test the validity of a regulatory statute which operated against employers, but whose effect was to induce the employer to discharge the employee. Again, in *Buchanan v. Warley*, 245 U. S. 60, a white person was able to test the validity of an ordinance prohibiting colored persons from buying his house. What is important, in other words, is not the *person* against whom the regulation is directly addressed, but the *relationship* regulated, and the various parties to that relationship have standing to test the regulation.

Even this complication is not present in the case of the individual petitioners. They, as potential government employees¹¹ and as members and officers of the National Council, are directly "regulated" by the finding which creates for them the status of *prima facie* ineligibility for government employment on grounds of "disloyalty."

It is true that petitioners are not presently applicants for federal employment. But for them to apply would be a futile and meaningless gesture so long as there is in

¹¹ Paragraph 41 of the complaint alleges that some of the individual petitioners have in the past had government employment, and that because of their expert professional knowledge the individual petitioners had a reasonable expectancy of similar employment in the future, which has been impaired, if not destroyed, by respondents' actions. R. 15, 16.

effect a rule which clearly would exclude them as leading spirits of the National Council. Their status is, therefore, as firm as that of the tea importer in *Waite v. Macy, supra*, who was able to challenge a rule which would have excluded his tea without waiting to have it actually excluded.

It is apparent that the distinction between "regulation" and "mere administrative finding" may in certain cases involve niceties. In our view, this, if ever, was a case where the leaning should be toward finding "regulation." In other cases, usually the person complaining of the finding has a later opportunity to contest it by challenging the future action based upon the finding. But no such opportunity is available to the National Council precisely because the immediate impact of the future application is on individuals. What is more, under the Executive Order even those individuals have no opportunity in the administrative exclusion proceeding to attack the validity or accuracy of the Attorney General's designation.

b. *The Attorney General's determination was made without due process of law*

We have seen, then, that the Attorney General's determination that the National Council is a "subversive" organization is a "regulation," and is, therefore, subject to the requirements of the due process clause. Clearly these requirements were not observed. In the words of the editorial in *The Washington Post, supra*, the determination of the Attorney General was made "without any fixed standards or process whatsoever. The Council of American-Soviet Friendship was placed on the Attorney General's list of subversive organizations without any advance notice, without a hearing, without the presentation of any supporting evidence and without any oppor-

tunity to appeal for judicial review. If this can be called 'due process' then the fifth amendment accords Americans no protection at all."

No justification has been offered, nor can any conceivably be offered, for this secret procedure adopted by the Attorney General. The request of the National Council to the Attorney General for the particulars upon which he based his judgment and for a public hearing received only the curt and unresponsive reply that "the Executive Order contains neither provision nor authorization for any of the procedural steps to which you have referred" (R. 12).

The Executive Order does, however, provide that the Attorney General may list an organization as subversive only "after appropriate investigation and determination." The complaint alleges that no such investigation was made (R. 11-12), and this allegation was admitted by the government's motion to dismiss. If this phrase in the Executive Order is to be given any meaning whatsoever, it is clear that the Attorney General misplaced his reliance on the Executive Order in denying notice and hearing. By such a denial he was violating the Executive Order.

Since the Attorney General's determination was a regulatory adjudication operating on a particular person, it had to observe procedural due process, including the giving of an administrative hearing prior to adjudication. *Shields v. Utah-Idaho Central R. R. Co.*, 305 U. S. 177; *Morgan v. United States*, 304 U. S. 1; *Lloyd Sabaud v. Elting*, 287 U. S. 329. Due process of law requires a full and fair hearing with prior notice of the nature of the issues involved, *Morgan v. United States*, *supra*; cf. *United States v. Cruikshank*, 92 U. S. 542, 558, 559; *United States v. Cohen Grocery Company*, 255 U. S. 81, 87, 89, and an opportunity to examine the evidence, to cross-examine witnesses, cf. *Motes v. United States*, 178 U. S. 458, 467, 471;

Kirby v. United States, 174 U. S. 47, 55, 61; *United States v. Lovett*, 328 U. S. 303, 317; and to present evidence on one's own behalf. *In re Oliver*, 333 U. S. 257. Nor may administrative agencies, any more than courts, adjudicate on the basis of evidence secretly collected and not revealed to the parties. *I. C. C. v. Louisville & N. Ry. Co.*, 227 U. S. 88, 93; *U. S. v. Abilene*, 265 U. S. 274, 286, 291.

This lack of procedural due process is further aggravated by the lack of standards employed by the Attorney General. The Executive Order empowers the Attorney General to list organizations which are "totalitarian, fascist, communist, or subversive." These words have no precise meaning, and the Attorney General has not indicated what he considers their content to be. Since there is no hearing and the basis for the determination is unrevealed, the Attorney General has unfettered discretion, and may list any organization which incurs his displeasure. In the present case, he has chosen, without particulars, without supporting evidence, and without a hearing, to brand an organization which engages only in the lawful propagation of ideas. If such practice is sanctioned, it can no longer be said that ours is "a government of laws not of men." Frankfurter, J., in *U. S. v. United Mine Workers of America*, 330 U. S. 258, 307.

5. VIOLATION OF RIGHT AGAINST BEING DEFAMED BY ULTRA-VIRES ACTION

a. *Petitioners Are Entitled to Relief if Respondents' Actions Are in Excess of Constitutional and Statutory Authority*

Not all harm caused by unconstitutional or unauthorized administrative action is redressable. The harm must also be "legal injury," that is, harm to legally protected interests.

When the validity of administrative action is challenged under the First and Fifth Amendments, there is no problem as to the source of the legally protected interests. These Amendments themselves create such interests in persons, the First creating certain protected interests in expression and assembly, and the Fifth creating certain protected interests in the procedures of regulation. Where, however, the challenge is that the administrative action is *ultra-vires* of the power of the Executive or of the powers of the federal government under the Tenth Amendment, the case is different. In Tenth Amendment cases, unlike First and Fifth Amendment cases, the protected interests must be found in a source other than the Tenth Amendment itself. The Tenth Amendment, in other words, is regarded not as creating individual rights but rather as imposing duties owed to the body politic. In Tenth Amendment cases, therefore, it is not enough to show harm caused by *ultra-vires* action; the harm must be to an interest protected by some other provision of the Constitution, by statute, or by common-law. *Tennessee Electric Power Co. v. TVA*, 306 U. S. 118; cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113. The test as to whether the interest invaded by a Tenth Amendment violation is protected by common-law is whether the invasion was one which would be subject to legal redress if committed by a private person (i. e., "tortious").

Thus in the *TVA* case, *supra*, the plaintiff suffered damage from competition by the TVA's engaging in activities challenged as exceeding federal power under the Tenth Amendment. The Court held that since "competition between natural persons is lawful" (at 138), plaintiff had asserted no right "protected against tortious invasion" (at 137), and hence had shown no harm to a legally protected interest. The case, then, would have been otherwise if the harm resulting from *ultra-vires* action had been caused not merely by competition, but by competitive practices of a kind

which are normally tortious (certain "unfair business practices"). In the *Perkins* case, *supra*, the harm suffered by plaintiff was exclusion from selling goods to the federal government unless it complied with conditions imposed by the Secretary of Labor allegedly in violation of statutory provisions. The Court held that plaintiff had not shown legal injury. Since, generally speaking, a prospective seller has no legal redress against a private person who refuses to buy the seller's goods except on his own conditions, the Secretary's determination could not be challenged even if it violated the statute. As stated by the Court (at 129), "The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation." The statute involved, then, was, like the Tenth Amendment, regarded not as creating individual rights, but only a duty to the body politic. Hence, as in Tenth Amendment cases, violation of the statute was actionable only if the harm caused was tortious if committed by a private person (or was to interests created by the Constitution or some other statute). The case would have been different if the statute, like the First and Fifth Amendments, created individual rights, in which case all plaintiff would have to show would be a violation of the statute and harm resulting therefrom to the rights created. Thus if a statute requires an official to buy from a named individual, the latter can restrain the official from buying from others instead.

Under the *TVA* and *Perkins* cases, therefore, if appellees' actions are in excess of their constitutional authority, redress is available if those actions injure interests which by common-law, statute or Constitution are normally given protection. So, therefore, legal and equitable writs have run to redress or restrain harm to common-law rights by the unauthorized actions of government officials. *Land v. Dollar*, 330 U. S. 731; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *American School of Magnetic Healing v. McAnnulty*,

187 U. S. 94. See also *Larson v. Domestic & Foreign Commerce Corp.*, *supra*. Obviously, this test is different than the theory pressed by respondents (and properly applicable only to due process rights) that rights exist only against administrative action which is "regulation."

We shall leave to a later sub-section the question of whether respondents' actions are in fact beyond their authority. At present, we consider only whether petitioners have acquired standing to make this contention by showing that respondents' actions, if *ultra-vires*, harm interests which are normally protected.

Clearly they do so in two respects. First, they harm interests in free speech, press and assembly, and these are constitutionally protected.

In addition, they harm the interest in reputation which is protected by the common law against invasion by private persons and thus, as we have seen, against invasion by *ultra-vires* administrative action.

The complaint alleges that respondents have published, and are continuing to publish, the "finding" that the National Council is an organization which is "totalitarian, fascist, communist or subversive" or which has adopted "a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." The application of such a description to an individual is clearly actionable defamation, since it impugns his reputation so "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." 3 Restatement, Torts, sec. 559. A statement that a person is a Communist, a Communist representative, or a Communist sympathizer has been repeatedly held to be libelous. *E. g. Spanel v. Pegler*, 160 F. (2d) 619; *Wright v. Farm Journal, Inc.*, 158 F. (2d)

197; *Grant v. Readers' Digest Association*, 151 F. (2d) 733, cert. den., 326 U. S. 797; *Mencher v. Chesley*, 297 N. Y. 94, 75 N. E. (2d) 257.

Accordingly, the individual petitioners have been injured in their interest in reputation, protected by the common-law, since the characterization of the National Council obviously impugns those who, like the petitioners, are its leading spirits and agents in the public eye.

The National Council, of course, has been even more directly defamed. A non-profit membership corporation which "depends upon the financial support of the public" suffers actionable defamation from publication of any matter "which tends to prejudice it in public estimation and thereby to interfere with the conduct of its activities." 3 Restatement, Torts sec. 561(2). Accord: *N. Y. Society for Suppression of Vice v. MacFadden Publications*, 260 N. Y. 167, 183 N. E. 284, 86 A. L. R. 440. Obviously the Attorney General's designation is of such a nature. Cf. *Pullman Standard Car Mfg. Co. v. Union*, 152 F. (2d) 493, holding a corporation libeled by statements reflecting on its patriotism.

It follows from the foregoing that petitioners have legal redress for such defamation if respondents' actions were beyond their statutory or constitutional power.¹²

Here is most glaringly exposed respondents' error in seeking to extend to all rights the doctrine that publication alone does not violate rights under the due process clause. For it is only publication and not "regulation" that violates rights in reputation. This right, derived from common-law sources, is not affected by the due process clause require-

¹² Government officials are not, because of policy reasons, liable in money damages for defamatory statements made in connection with their official actions. *Spalding v. Vilas*, 161 U. S. 483. But the elimination of the remedy at law obviously does not eliminate, but fortifies, equitable relief. Cf. *Groner, C. J.*, concurring in *Glass v. Ickes*, 117 F. (2d) 273, 281; *United States v. Lovett*, 328 U. S. 303, 316.

ment of "regulation" any more than are other common-law rights against tortious actions or breaches of contracts.

b. Respondents' Actions Are in Excess of Constitutional and Statutory Authority

Our Constitution grants no power to any government official to list organizations as subversive or disloyal. Ours is a government of enumerated powers, and authority exercised by any branch of the federal government must find its source either in an express or implied power granted by the Constitution. *McCulloch v. Maryland*, 4 Wheat 316; *U. S. v. Butler*, 297 U. S. 1; *Marshall v. Gordon*, 243 U. S. 521. The President, as well as Congress, possesses no power not derived from the Constitution, *Ex parte Richard Quirin*, 317 U. S. 1, 25, 26.

In the *Joint Anti-Fascist* case, the court rested the right to designate organizations as subversive on the President's duty to execute federal laws (Constitution, Article II, Sec. 3). But there is no law which is here being executed. Section 9A of the Hatch Act, 5 U. S. C. sec. 118j, to which the court referred, makes ineligible for government employment members of any organization which "advocates the overthrow of our constitutional form of government in the United States." The Executive Order, however, calls for the listing of organizations other than those described by the Hatch Act.¹² And this listing has no substantial relevancy to the efficiency or loyalty of government employees. Indeed, as we have already shown, the listings under the Executive Order violate another section of the Hatch Act (5 U. S. C. sec. 118i).

¹² The difference between Hatch Act organizations and those described in the Executive Order is self-evident. It has also been expressly recognized by the Loyalty Review Board and the Attorney General (13 F. R. 9368-9369) and the Comptroller General (17 U. S. Law Week 2327, Jan. 25, 1949). The respondents have never asserted that the National Council "advocates the overthrow of our constitutional form of government."

Furthermore, this Court has declared that no government official has power to prescribe orthodoxy of beliefs. *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642; *Hannegan v. Esquire*, 327 U. S. 146, 158; *Thomas v. Collins*, 323 U. S. 516, 545. The Attorney General has applied the Executive Order so as to make himself a judge of political orthodoxy and loyalty and so as to inform the public that certain ideas are officially discouraged and prohibited. He has thus violated the most revered traditions of our Constitution. See Commager, *Who Is Loyal to America*, Harper's Magazine, Sept. 1947; De Tocqueville, II *Democracy in America*, 117 (Bradley ed. 1945); O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592, 605; Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L. J. 1, 116.

Conclusion

The basic issue in this case has been aptly put in the conclusion of the editorial from The Washington Post, cited *supra*:

If the Attorney General can put the Council of American-Soviet Friendship outside the pale of decency by an arbitrary designation of it as disloyal, he can do the same in respect of any religious, political, or social organization advocating unorthodox or unconventional beliefs. This is a power incompatible with a government of laws. It is a power irreconcilable with freedom.

The writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

ABRAHAM J. ISSERMAN,
39 W. 67th Street,
New York, N. Y.

DAVID REIN,
JOSEPH FORER,
FORER & REIN,
711 Fourteenth Street, N. W.,
Washington, D. C.,
Attorneys for Petitioners.